Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

BRAD R. JOHNSON,

Plaintiff

v.

FRANCHISE TAX BOARD, STATE OF CALIFORNIA,

BILL LOCKYER,

DENNIS L. STOUT,

COUNTY OF SAN BERNARDINO,
STATE OF CALIFORNIA,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

Dr. Brad R. Johnson
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

BRAD R. JOHNSON,)
Plaintiffs,)
v.)
FRANCHISE TAX BOARD,)
STATE OF CALIFORNIA;)
OFFICE OF THE)
ATTORNEY GENERAL,)
DEPARTMENT OF JUSTICE,)
STATE OF CALIFORNIA;)
BILL LOCKYER,)
ATTORNEY GENERAL,)
DEPARTMENT OF JUSTICE,)
STATE OF CALIFORNIA;)
DENNIS L. STOUT, OFFICE)
OF THE DISTRICT)
ATTORNEY, COUNTY OF)
SAN BERNARDINO, STATE)
OF CALIFORNIA; OFFICE)
OF THE DISTRICT)
ATTORNEY, COUNTY OF)
SAN BERNARDINO, STATE)
OF CALIFORNIA; and)
COUNTY OF SAN)
BERNARDINO, STATE OF)
CALIFORNIA,)
)
Defendants)

FILED
AUG 28 2001
John M. Waters, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT
OF ILLINOIS

Case No. 01-2145

REPORT AND RECOMMENDATION

In June 2001, Plaintiff, Brad R. Johnson, filed a Complaint and Demand for Jury Trial (#1) against

Defendants Franchise Tax Board of the State of California; Office of the Attorney General, California Department of Justice; Bill Lockyer, California Attorney General; Dennis L. Stout, Office of the District Attorney for San Bemardino County, California; Office of the District Attorney for San Bernardino County, California; and County of San Bernardino, California.

In July 2001, Defendant County of San Bernardino (including the Office of the District Attorney and Dennis Stout) filed a Motion To Dismiss Complaint for Improper Venue, or in the Alternative, Motion for Change of Venue (#4). Plaintiff then filed a Motion To File Amended Complaint (#7). After reviewing the parties' pleadings and memoranda, this Court recommends, pursuant to its authority under 28 U.S.C. § 636(b)(1)(B), that Defendant's Motion To Dismiss (#4-1) be **DENIED** and Defendant's Motion for Change of Venue (#4-2) be **GRANTED**. The Court also recommends that Plaintiffs Motion To Amend (#7) be **DENIED**.

I. Background

Plaintiff's 48-page complaint alleges that Defendants violated RICO and violated his constitutional rights under the Fifth and Fourteenth Amendments, and also alleges defamation and intentional infliction of emotional distress. Jurisdiction is based on federal question.

II. Standards of Review

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. *Miller v. Reebie Storage and Moving Company, Inc.*, No. 93C3986, 1993 WL 414689, at *1 (N.D. Ill. October 15, 1993). When considering a motion to dismiss, the Court must accept as true all well-pleaded factual allegations in the claims, and draw all reasonable inferences in the light most favorable to the nonmoving party. *Gutierrez v. Peters*, 111 F.3d 1364, 1368-69 (7th Cir. 1997). The Court should dismiss the claim only if the nonmoving party can prove no set of facts consistent with

the allegations of the complaint that would entitle him to relief. *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1319-20 (7th Cir. 1997).

The party requesting a transfer of venue bears the burden of showing that a different venue is "clearly more convenient." *Heller Fin. Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1293 (7th Cir. 1989); *Pasulka v. Sykes*, 131 F. Supp. 2d 988, 994 (N.D. Ill. 2001). In addition, a plaintiff's selected venue "is given deference, unless it lacks any significant contacts with the claim." *Id.* at 995.

III. Discussion

A. Motion To Dismiss Complaint for Improper Venue, or in the Alternative, Motion for Change of Venue

Defendant argues that Central District of Illinois should dismiss the case based on improper venue under 28 U.S.C. § 1391. Alternatively, it asks the Court to transfer the proceedings to the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1404 because all Defendants reside in California and a substantial part of the events occurred there.

As a preliminary matter, the Court notes that, in arguing that venue is proper in the Central District of Illinois, Plaintiff presents a number of arguments related to jurisdiction. No one disputes that federal courts have federal question jurisdiction over the claims in this case pursuant to 28 U.S.C. § 1343. The propriety of venue in the Central District of Illinois is the issue here, not the existence of federal jurisdiction.

The applicable statute governing venue when jurisdiction is based on federal question is 28 U.S.C. 1391(b), which provides as follows:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the

> action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b).

Plaintiff contends that subsection (2) of the statute applies because the claim arose in the Central District of Illinois. Specifically, he contends that the claim arose in the Central District because the injury occurred there. Therefore, his choice of venue is proper. He apparently concludes that the injury "occurred" in Illinois because that is where he lives and he is the allegedly injured party. He states as follows:

> In the present action, since deprivation, damage, and harm are necessary elements of the legal theories invoked, claims of (1) violations of constitutional guarantees under the Fifth and Fourteenth Amendments of the U.S. Constitution and (2) violations of RICO arise where the locus criminis or the locus in quo of such deprivation,

damage, and/or harm occurs. In the present action, that place is Kankakee County, State of Illinois.

(Plaintiff's Response in Opposition to Defendants' Motion To Dismiss Complaint for Improper Venue, or in the Alternative, Motion for Change of Venue, #9, p. 12.) He cites no authority to support his argument.

This Court has reviewed Plaintiff's long and detailed complaint and finds no allegations of any events taking place in the Central District of Illinois. The party requesting a transfer of venue bears the burden of showing that a different venue is "clearly more convenient." *Heller Fin*, 883 F.2d at 1293. Here, Defendant has met its burden. Courts may consider the convenience of parties and witnesses when addressing a request for transfer of venue. 28 U.S.C. § 1404(a). All Defendants reside in California. Moreover, based on the lengthy complaint, it appears that most of the alleged events occurred in California, although some of the banking activities occurred in Oregon. In fact, Plaintiff has not alleged any connection with the Central

District of Illinois except that he now resides there. While the Court acknowledges that a plaintiff's selected venue is given some deference; in a case such as this, where the material events giving rise to the claim have no connection with the plaintiff's preferred venue, the Court need not defer to the plaintiff. See *Pasulka*, 131 F. Supp. at 994. Nothing in the complaint indicates a connection with the Central District of Illinois and this lawsuit's connection to California is unmistakable. Accordingly, the Court recommends granting Defendant's motion to transfer venue to the United States District Court for the Central District of California. Because the Court recommends transferring this case, it will not consider Defendant's motion to dismiss on the basis of improper venue.

B. Plaintiff's Motion To Amend

After Defendant filed its motion to transfer venue, Plaintiff filed a motion to amend his complaint, requesting leave to amend the complaint "to take into account the statements made by Defendants' Motion to Dismiss

Complaint for Improper Venue . . . for the purpose of making such amended complaint clearer and more concise." (Plaintiff's Motion to File Amended Complaint, #7, p. 6.) In his Memorandum of Law in Support of Plaintiff's Motion To File Amended Complaint (#8), Plaintiff summarizes the allegations of his complaint and restates his desire to amend that complaint '"to take into account the statements made by Defendants' Motion to Dismiss." (#8, p. 6)

The Federal Rules of Civil Procedure require that "leave shall be freely given when justice so requires." Fed.R.Civ .P. 15. Nevertheless, a court need not allow amendment if it would be futile. *Payne v. Churchich*, 161 F.3d 1030, 1036 (7th Cir. 1998), *cert. denied*, 527 U.S. 1004 (1999). In this case, Plaintiff has filed an extremely detailed complaint, well beyond a "short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed.R.Civ.P. 8. Considering the detail Plaintiff has lavished on his complaint, the Court concludes that it is unlikely

that he left out any material events giving rise to the claim that would connect this claim to the Central District of Illinois. Accordingly, the Court recommends denying Plaintiff's motion to amend at this time.

IV. Summary

For the reasons set forth above, this Court recommends that Defendant's Motion To Dismiss (#4-1) be **DENIED** and Defendant's Motion for Change of Venue (#4-2) be **GRANTED**. The Court also recommends that Plaintiff's Motion To Amend (#7) be **DENIED** at this time. The parties are advised that any objection to this recommendation must be filed in writing with the clerk within ten (10) working days after being served with a copy of this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1). Failure to object will constitute a waiver of objections on appeal. *Video Views, Inc. v. Studio 21, Ltd*, 797 F.2d 538 (7th Cir. 1986).

Entered this 28th day of August, 2001.

/s/

DAVID G. BERNTHAL
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
DANVILLE/URBANA DIVISION

BRAD R. JOHNSON, Plaintiffs, v. FRANCHISE TAX BOARD, STATE OF CALIFORNIA; OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, STATE OF CALIFORNIA; BILL LOCKYER, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, STATE OF CALIFORNIA; DENNIS L. STOUT, OFFICE OF THE DISTRICT ATTORNEY, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA; OFFICE OF THE DISTRICT ATTORNEY, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA; and COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, Defendants	**FILED** SEP 19 2001 John M. Waters, Clerk U.S. DISTRICT COURT CENTRAL DISTRICT OF ILLINOIS **Case No. 01-CV-2145**

ORDER

A Report and Recommendation (#13) was filed by the Magistrate Judge in the above cause on August 28,

2001. On September 17, 2001, Plaintiff, Brad R. Johnson, filed his Objection to the Report and Recommendation (# 14) and a Memorandum in Support (# 15). This court has carefully reviewed the Magistrate Judge's reasoning and Plaintiff's Objection and Memorandum of Law. After a thorough and careful de novo review, this court agrees with the Magistrate Judge that this case should be transferred to the Central District of California, but concludes that the transfer must be pursuant to 28 U.S.C. § 1406(a) rather than pursuant to 28 U.S.C. § 1404(a).

Defendants County of San Bernardino, the Office of the District Attorney and Dennis Stout, filed a Motion to Dismiss Complaint for Improper Venue, or in the Alternative, Motion for Change of Venue (#4). Plaintiff is correct that Defendants did not ask this court to transfer venue pursuant to 28 U.S.C. § 1404(a). Defendants moved for dismissal of Plaintiff's Complaint pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure and, in the alternative, sought an order transferring the case pursuant

to 28 U.S.C. § 1406(a). While a court may consider a transfer pursuant to 28 U.S.C. § 1404(a) sua sponte (see AMCO Ins. Co. v. Tutera Group Inc., 1994 WL 714560, at *2 (N.D. Ill. 1994); Smith v. Thomas, 1990 WL 37630, at *2 (N.D. Ill. 1990)), such a transfer is only proper where venue is proper in the transferor court (AMCO Ins. Co., 1994 WL 714560, at *1).

In this case, this court concludes that venue is not proper in this court. Defendants incorrectly argued that Plaintiff based "the venue of the present action in large part upon the court's diversity jurisdiction." It is clear, however, that Plaintiff has alleged federal causes of action based upon 42 U.S.C. § 1983 and the Racketeering Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 et seq.). Pursuant to 28 U.S.C. § 1391(b), where jurisdiction is not founded solely on diversity of citizenship, a civil action may be broughtonly in:

(1) a judicial district where any defendant resides, if all defendants reside in the same State,

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or

(3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought. 28 U.S.C. § 1391(b).

"One of the central purposes of statutory venue is to ensure that a defendant is not 'haled into a remote district having no real relationship to the dispute.'" Selzer v. County of Allegan, 1998 WL 749436, at *5 (N.D. Ill. 1998), quoting Woodke v. Dahm, 70 F.3d 983, 985 (8th Cir. 1995).

In this case, all of the Defendants are residents of California and, therefore, none of the Defendants are residents of this district. Accordingly, Plaintiff cannot rely on 28 U.S.C. § 1391(b)(1) to establish venue here. Plaintiff argues that venue is proper under 28 U.S.C. § 1391(b)(2) because he is a resident of this district and, therefore, this

is where the injury occurred. This court does not agree. Based upon the detailed allegations of Plaintiffs Complaint (#1) as well as the Affidavit of Plaintiff (#11) and the Affidavit of Viki S. Hollander (#12), it is clear that all of the actions by Defendants that Plaintiff is complaining of occurred in California. There are no facts alleged showing that any of "the events or omissions giving rise to the claim occurred" in this district. See 28 U.S.C. § 1391(b)(2).

This court has carefully reviewed all of the case law cited by Plaintiff and finds all of it inapplicable to this case. The case law simply does not support Plaintiff's notion that the fact that he resides here, and thereby allegedly suffered financial damage and damage to his reputation here, as a result of Defendants' wrongful actions in California, means that venue is proper in this district. In all of the cases cited by Plaintiff, some action, such as kidnapping or discharge from employment, occurred in the district where venue was found to be proper. This court further notes that Plaintiff's citation of cases

involving infringement of a patent, trademark or copyright are clearly inapplicable. This court concludes that this case is most similar to Selzer. In that case, the pro se plaintiff alleged that the defendants, all of whom were residents of Michigan, engaged in a conspiracy against her to deprive her of her property rights. The plaintiff based her cause of action on 42 U.S.C. § 1983, 1985 and 1986, and on RICO. The court in Selzer concluded that venue was not proper in the Northern District of Illinois, the district where the plaintiff resided. Selzer, 1998 WL 749436, at *5.

This court also rejects Plaintiffs suggestion that venue is proper in this district because Plaintiffs bank account is located here. Based upon the allegations of this case, Plaintiffs bank account was garnished by Defendants on two occasions. Plaintiffs Affidavit shows that the garnishment notices were sent to U.S. Bank in Portland, Oregon. Further, Plaintiff stated in his Affidavit that the U.S. Bank branch nearest to him was located in the North

Chicago suburb of Lincoln Park. Plaintiff nevertheless contends that his bank account is located in this district "[b]ecause the situs of my U.S. Bank account is my place of domicile." Even accepting this rather bold, essentially unsupported statement, Plaintiff has not shown that venue is proper here. Plaintiff is seeking damages from Defendants, not any relief related to his bank account. Accordingly, Plaintiff's bank account is not the "subject" of this action and venue is not proper even if Plaintiff is correct that his bank account is located here. See 28 U.S.C. § 1391 (b)(2) (venue proper in judicial district where "a substantial part of property that is the subject of the action is situated").

In addition, to the extent that Plaintiff raises RICO claims against Defendants, 18 U.S.C. § 1965 is the applicable venue statute. Under 18 U.S.C. § 1965, a civil action against any person may be instituted in the district court of the United States for any district in which such

person is found, has an agent, or transacts his affairs" (18 U.S.C. § 1965(a)) or "in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court" (18 U.S.C. § 1965(b)). In this case, it is clear that venue is not proper based upon § 1965(a) because no Defendant resides here or has any connection to this district. As far as § 1965(b), the Seventh Circuit has suggested that the "ends of justice" do not require proper venue in a district where another district will have jurisdiction over the defendants. See Lisak v. Mercantile Bancorp. Inc., 834 F.2d 668, 672 (7th Cir. 1987); cert. denied, 485 U.S. 1007 (1988); Selzer, 1998 WL749436, at *5. This court concludes, based upon Lisak and Selzer that the "ends of justice" do not require it to summon the California Defendants to this district. See Selzer, 1998WL 749436, at *5. This court sees no reason to hale these Defendants into this district for actions they committed in California. Accordingly, this court concludes that venue is not proper

in this district for Plaintiff's RICO claims. See Selzer, 1998 WL 749436, at *5.

This court has concluded that venue is not proper in this district. However, this court declines to dismiss the action. When a case is filed in the wrong district, 28 U.S.C. § 1406(a) authorizes the district court to dismiss or "if it be in the interest of justice," to transfer the case to "any district or division in which it could have been brought." Following careful consideration, this court concludes that the "interest of justice" supports granting Defendants' alternative request that this case be transferred to the Central District of California pursuant to 28 U.S.C. § 1406(a). See Selzer, 1998 WL 749436, at *6.

Finally, this court agrees with the Magistrate Judge that Plaintiffs Motion to File Amended Complaint (#7) should be denied. This court agrees that it is unlikely that Plaintiff left out of his Complaint any material events giving rise to the claim that would connect this claim to the

Central District of Illinois. This court has reached this conclusion after careful review of Plaintiff's detailed Affidavit (#11).

IT IS THEREFORE ORDERED THAT:

(1) Plaintiffs Motion to File Amended Complaint (#7) is DENIED.

(2) Defendants' Motion to Dismiss Complaint for Improper Venue, or in the alternative, Motion for Change of Venue (#4) is GRANTED. This case is transferred to the Central District of California pursuant to 28 U.S.C. § 1406(a).

Entered this 19th day of September, 2001.

/s/

MICHAEL P. McCUSKEY
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
DANVILLE/URBANA DIVISION

BRAD R. JOHNSON, Plaintiffs, v. FRANCHISE TAX BOARD, STATE OF CALIFORNIA; OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, STATE OF CALIFORNIA; BILL LOCKYER, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, STATE OF CALIFORNIA; DENNIS L. STOUT, OFFICE OF THE DISTRICT ATTORNEY, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA; OFFICE OF THE DISTRICT ATTORNEY, COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA; and COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, Defendants	**FILED** OCT 30 2001 John M. Waters, Clerk U.S. DISTRICT COURT CENTRAL DISTRICT OF ILLINOIS **Case No. 01-CV-2145**

ORDER

On September 19, 2001, this court entered an Order (#16) which DENIED Plaintiff's Motion to File Amended Complaint (#7) and GRANTED the Motion for Change of

Venue (#4) filed by Defendants County of San Bemardino, the Office of the District Attorney and Dennis Stout. Also On September 19, 2001, Plaintiff filed his First Amended Complaint (#17). On October 2, 2001, Plaintiff filed a Motion for Reconsideration of this Court's Order (#18) and a Memorandum in Support (#19).

In his Motion, Plaintiff argues that this court improperly denied his Motion to File Amended Complaint. The court now concludes that Plaintiff is correct that he had the right to amend his "pleading once as a matter of course at any time before a responsive pleading is served." Fed. R. Civ. P. 15(a). A responsive pleading does not include a motion to dismiss. Duda v. Board of Educ. of Franklin Park Pub. Sch. Dist. No. 84, 133 F.3d 1054, 1056-57 (7th Cir. 1998). Therefore, because no responsive pleading had been filed, Plaintiff should have been allowed to file an amended complaint. However, Plaintiff did, in fact, file his First Amended Complaint (#17).

Plaintiff also argues that this court should not have granted Defendants' Motion for Change of Venue. This court has carefully considered all of the arguments raised by Plaintiff in his Motion and has also carefully considered all of the allegations included in Plaintiff's First Amended Complaint. This court notes that, while Plaintiff's First Amended Complaint adds claims for violations of the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) and for violations of the Fair Debt Collections Practices Act (15 U.S.C. § 1692-1692o), it does not add any allegations that any of "the events or omissions giving rise to the claim occurred" in this district. See 28 U.S.C. § 1391(b)(2). This court specifically notes that Plaintiff does not allege that any of Defendants' actions took place in Illinois. There are no allegations that Defendants sent anything to him in Illinois or made any telephone calls to him in Illinois. Accordingly, this court again concludes that venue is not proper in this district.

IT IS THEREFORE ORDERED THAT:

(1) Plaintiff's Motion for Reconsideration (#18) is GRANTED as to Plaintiff's request that this court reconsider its Order which denied Plaintiff's Motion to File Amended Complaint (#7). Plaintiff's Motion to File Amended Complaint (#7) is now GRANTED. This court notes that Plaintiff has already filed his First Amended Complaint (#17).

(2) Plaintiff's Motion for Reconsideration (#18) is DENIED as to Plaintiff's request that this court reconsider its Order which granted Defendants' Motion for Change of Venue (#4). This case is transferred to the Central District of California pursuant to 28 U.S.C. § 1406(a).

Entered this 29th day of October, 2001.

/s/

MICHAEL P. McCUSKEY
U.S. DISTRICT JUDGE